In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-62.

MASHPEE TRIBE,
PETITIONER,

v.

NEW SEABURY CORP., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents in Opposition.

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The respondents, defendants below, submit this brief in opposition to the petition for certiorari filed by the petitioner, the alleged Mashpee Tribe, and respectfully request that the petition for certiorari be denied.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on February 13, 1979, affirming a judgment of the United States District Court for the District of Massachusetts dated March 24, 1978. On May 1, 1979, Mr. Justice Brennan signed an order extending the time for the petitioner to file a petition for a writ of certiorari to and including July 13, 1979.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit (Pet. 1a) is reported at 592 F. 2d 575 (1979). The opinion of the United States District Court for the District of Massachusetts (Pet. 37a) is reported at 447 F. Supp. 940 (1978). An earlier opinion of the United States District Court for the District of Massachusetts on issues not involved here is reported at 427 F. Supp. 899 (1977) (Pet. 54a).

Counterstatement of Questions Presented.

1. Whether the Court of Appeals was correct in holding that the District Court did not abuse its discretion in declining to stay trial of the issue of tribal existence pending review of the petitioner's application for federal recognition by the Department of the Interior?

2. Whether the Court of Appeals was correct in holding that the District Court did not commit prejudicial error in instructing the jury that the petitioner had the burden of proof that it existed at all relevant times as an Indian tribe within the meaning of the Nonintercourse Act?

3. Whether the Court of Appeals was correct in holding that the District Court did not commit prejudicial error in instructing the jury that:

> (a) a group of persons claiming to be an Indian tribe within the meaning of the Nonintercourse Act must establish its independent legal existence;
>
> (b) tribal status may be terminated by voluntary abandonment; and
>
> (c) a group of persons claiming to be an Indian tribe within the meaning of the Nonintercourse Act must establish its existence as a defined and distinct Indian community which has not been assimilated into the general populace?

4. Whether the Court of Appeals and the District Court were correct in holding that the jury's special verdicts were not so irreconcilably inconsistent or fatally ambiguous that there was no view of the evidence which permitted those special verdicts to be harmonized?

5. Whether the Court of Appeals was correct in holding that the petitioner failed to preserve properly its objections to the clarity of the jury's special verdicts?

6. Whether the petitioner properly preserved its objections to the consistency of the jury's special verdicts?

7. Whether the Court of Appeals was correct in holding that the District Court acted within the bounds of discretion in determining, after hearing, that there was no evidence of prejudicial communication with a juror requiring either further inquiry or a new trial?

Statutes Involved.

The statutory provisions involved are correctly set forth in the petition.

Counterstatement of the Case.

The petitioner, the alleged Mashpee Tribe (hereinafter "the petitioner"), claims title to essentially all of the land in the Town of Mashpee, Massachusetts, and a small portion of land in the adjoining Town of Sandwich, Massachusetts (hereinafter "the subject land"). Specifically, the petitioner claims that all persons asserting any interest in or title to the subject land obtained that interest or title in violation of section 12 of the Indian Trade and Intercourse Act of 1834, now codified in part as 25 U.S.C. § 177 (1963) (hereinafter "the Nonintercourse Act"). In this action, the petitioner seeks immediate possession of all of the subject land and trespass damages in the amount of $500,000,000. The named defendants,[1] respondents here (hereinafter "the respondents"), represent a defendant class consisting of all persons asserting title to and interests in the subject land adverse to the petitioner. The jurisdiction of the District Court was invoked and sustained pursuant to 28 U.S.C. § 1331. Pet. 55a.

[1] The named defendants designated as class representatives are the Town of Mashpee; Maurice A. Cooper; John D. Ferguson; New Seabury Corporation; New Seabury Conveyancing Corporation; Fields Point Manufacturing Corporation; Thomas Otis, William M. Atwood, Russell Makepeace and Maurice Makepeace, general partners doing business as Wiljoles Lands, a Massachusetts limited partnership; Mary Jane Shoop; New Bedford Gas & Edison Light Company; Colton H. Bridges, as Director of the Division of Fisheries and Wildlife of the Commonwealth of Massachusetts (now Matthew B. Connolly, Jr.); and Greenwood Development Corporation.

The respondents answered the complaint, in part, by denying that the petitioner is or has been at all relevant times an Indian tribe entitled to the protections of the Nonintercourse Act. The District Court severed, and scheduled for a separate, preliminary trial, the limited issue of whether the petitioner existed as an Indian tribe within the meaning of the Nonintercourse Act in August, 1976, when this action was commenced, and on other relevant dates. Pet. 2a. The companion issues of whether the petitioner or its predecessors had ever owned or occupied the subject land and whether there had been any violations of the Nonintercourse Act were reserved for subsequent determination. Similarly deferred was adjudication of the issues raised by the affirmative defenses pleaded in the respondents' answer and counterclaim.

Prior to trial, the petitioner moved for a continuance of the trial pending a determination by the Department of the Interior of the petitioner's application for federal recognition as an Indian tribe. Pet. 2a. The District Court denied that motion but invited the Department of the Interior's participation at trial either as intervenor or as an *amicus curiae* with permission to submit questions through the court to witnesses. Pet. 4a. The District Court further informed the Department of the Interior that the petitioner's motion for a continuance had been denied, in part, because there is a "strong public interest in the prompt resolution" of this action. Pet 7a. In declining the District Court's invitation, the Department of the Interior stated that it had not yet taken "a definitive position on the regulations" governing the procedures and standards for determining federal recognition of tribal status and, therefore, would "not be able to participate meaningfully in the trial of this case at this time." Pet 4a. The Department further predicted that full consideration of the petitioner's application for federal recognition would take "a considerable period of time . . .." *See* Pet. 7a.

Trial commenced on October 17, 1977, and lasted 40 trial days. Pet. 2a. On January 4, 1978, the District Court, after a lengthy charge, submitted a series of special interrogatories, suggested by the parties and approved by the petitioner, to the jury. Pet. 2a-3a. On January 6, 1978, the jury returned its special verdicts. The jury found that the proprietors of Mashpee were an Indian tribe in 1834 and 1842. *Id.* However, the jury further determined that the proprietors of Mashpee were not an Indian tribe in 1790, 1869 and 1870 and that the petitioner did not constitute an Indian tribe at the time suit was commenced. *Id.*

Upon return of the special verdicts, the District Court, without discharging the jury, ordered a hearing for the petitioner "to show cause why an order of dismissal should not be entered on the basis of the jury's answers. . . ." Pet. 4a. At that hearing, the petitioner argued that the special verdicts were inconsistent and ambiguous and, therefore, a new trial was required. Pet. 4a. The District Court reserved decision.

Approximately three months after the close of the trial, but prior to issuance of the District Court's decision, the District Court received a communication from one John Doe[2] who claimed that he had discussed this action with one of the jurors while the trial was proceeding and that the juror had commented that he had received an anonymous phone call about the case. Pet. 30a-31a. The District Court promptly held a hearing, attended by counsel for the parties, at which Mr. Doe was examined. *Id.*

The next day, the District Court held a second hearing at which the juror in question was examined before counsel. *Id.* In response to questions posed by both the District Court and counsel, the juror testified that he had received one anonymous

[2]The real name of this person is set forth in the transcript of the March 9, 1978, hearing impounded by the District Court.

telephone call stating "you know which way you better go . . ." (Conference Tr. 3 [March 10, 1978]); that he did not recognize the voice (*id.*); that "the funny part about it" was that the caller did not indicate "which way" the juror was to vote (*id.* 3-4); that, in a conversation on the bus, he had mentioned the call to Doe (*id.* 9); and that he had never discussed the merits of the case at any time other than in the jury room (*id.* 4). At the conclusion of this hearing, the District Court specifically found that the evidence had disclosed "nothing . . . prima facie prejudicial" (*id.* 11); that the influence of the communication with the juror was "neutral" (*id.* 20); and that "what happened . . . did not impeach the jury's verdict in any way at all" (*id.* 11). The trial court consequently ordered the investigation closed.

On March 24, 1978, the trial court issued its memorandum and order for judgment specifically rejecting the petitioner's contention that the jury's special verdicts were either inconsistent or ambiguous. Pet. 50a-52a. The District Court further held that the jury's finding that the petitioner "was not a tribe for purposes of the Nonintercourse Act [footnote omitted] in 1976 was fully supported by the evidence. . . ." Pet. 52a. Having found no defects in the special verdicts, the District Court determined that they were a proper basis for entry of judgment dismissing the petitioner's claims. *Id.* Judgment was entered accordingly and the petitioner appealed.

On February 13, 1979, the Court of Appeals affirmed. Pet. 1a-36a. The Court of Appeals reviewed the prior proceedings in detail; referred to the District Court's full discussion of the highly specialized facts involved, Pet. 4a; and held that: (1) the District Court properly denied the petitioner's request for a pretrial continuance, Pet. 5a; (2) the District Court did not commit prejudicial error in instructing the jury concerning the definition of an Indian tribe, Pet. 20a, and the proper allocation of the burden of proof, Pet. 25a; (3) the jury's special ver-

dicts were neither irreconcilably inconsistent nor fatally ambiguous, Pet. 26a, 30a; and (4) the District Court did not abuse its discretion in investigating the impact on the jury verdict of an anonymous phone call to one of the jurors. Pet. 30a.

Counterstatement of Facts.

In 1665, Richard Bourne, a Christian missionary, began efforts to convert the Indians of the present day Sandwich-Mashpee-Barnstable area to Christianity (Tr. T. 34-150). Bourne discovered that the Indians of this area were living in scattered places in small groups; that their pre-existing societal structures had weakened to the point of virtual disappearance; and that their material culture had perceptibly changed (*id.*). Bourne therefore decided to gather into an English proprietary those Indians under his instruction who had removed themselves from Indian sovereignty and submitted to the jurisdiction of the New Plymouth Colony.[3]

In furtherance of this goal, Bourne arranged for the execution of two deeds by local Indian leaders transferring title to the land in the Mashpee area to Indians under his instruction (Tr. T. 34-170-178). These deeds not only effected a conveyance of title but also represented a relinquishment of Indian political sovereignty over the land conveyed and the persons occupying it (Tr. T. 5-31, 37). In 1685, the General Court of

[3]The petitioner implies that a "proprietorship" is a "special Indian communal form of ownership of land. . . ." Pet. 9. The evidence established, however, that the proprietary was an English form of land holding which enabled groups of individuals to acquire title to land from the Governor or General Court of the New Plymouth Colony (Tr. T. 34-111). It was a body corporate and politic and an essential and common unit of English colonial government (Tr. T. 34-155, 156). *See* Akagi, *The Town Proprietorships of the New England Colonies*, Peter Smith, Gloucester, Mass., 1963. Indeed, Massachusetts towns and proprietaries were identical until 1712 (Tr. T. 34-111).

the New Plymouth County, at the instance of Bourne's son, confirmed title to the land in Mashpee to these Indians (Tr. T. 35-33).

During the period 1685 through 1763, the residents of Mashpee existed as an English proprietorship and held the land of the proprietorship in common subject to a restraint on alienation. During this period, the Mashpee proprietors evinced a serious commitment to Christianity (Tr. T. 35-58, 66); considered themselves to be and were within the jurisdiction and sovereignty of the English government (Tr. T. 5-74; 35-62); made use of the courts of the Province of Massachusetts Bay to resolve their disputes (Tr. T. 35-116); and allocated land in severalty among themselves (Tr. T. 35-111-114). The Mashpee proprietors thus significantly differentiated themselves from the tribal Indians remaining in Massachusetts.

In 1763, the Mashpee proprietors were incorporated into a district, a unit of English government similar in organization and function to a town, and possessed with powers of local self-government (Tr. T. 6-6, 18). Pet. 41a. The loss of Mashpee men in the Revolutionary War and a rapid influx of "foreigners" into Mashpee, however, cast the infant district into a chaotic state (Tr. T. 6-31). In response, the General Court of Massachusetts enacted a series of laws terminating Mashpee's district status and imposing a guardianship (Tr. T. 35-148).[4]

The termination of Mashpee's district status and the imposition of guardians precipitated a flurry of intense political activity during the period 1833 through 1842 aimed at accomplishing two goals: (1) the reinstitution of district status; and (2) a division of the common lands among the proprietors (Tr. T. 36-8-14). The first of the proprietors' goals was

[4]Significantly, the Mashpee community, by 1776, had existed as an English political entity for more than 100 years.

achieved in 1834. Pet. 26a. The second was achieved in 1842. *Id.* The land allocated among the proprietors remained subject to a restraint on alienation prohibiting conveyance to any person other than a proprietor.

During the period following allotment of the common lands in 1842, substantial numbers of people emigrated from the District of Mashpee while a significant number of people of non-Indian ancestry immigrated to Mashpee (Tr. T. 36-40-41). Those persons remaining in Mashpee continued preparations for a complete social and political assimilation into the general populace of the Commonwealth of Massachusetts.

In 1869, the Governor of the Commonwealth of Massachusetts, acting in part upon petition by the majority of the Selectmen of the District of Mashpee, proposed legislation granting the Indians in Mashpee, as well as other Indians in Massachusetts, citizenship and removing all their legal disabilities, including restraints on alienation of land (Tr. T. 36-48-49). In June of 1869, the General Court passed such an act (Tr. T. 36-57)[5]; and in May, 1870, the General Court incorporated Mashpee as a town (Tr. T. 36-58). At the first official town

[5]In its memorandum and order for judgment, the District Court suggested that the 1842 act allotting the District lands in severalty operated to convey title to individual proprietors and therefore was "a significant date." Pet. 49a. This allotment of land in severalty, however, was merely a formalization of the long recognized "special custom" of the proprietors by which parcels of common land were allotted to individual proprietors (Tr. T. 35-112-114). Section 8 of the 1842 act specifically prohibited conveyances or transfers of the allotted parcels to persons other than proprietors.

The petitioner consistently asserted that no change in land tenure occurred until 1869 when the General Court passed an act which, in effect, removed all restraints on alienation of land in Mashpee. Upon enactment of this statute, full title and interest to the land in Mashpee vested in individuals for the first time. Only after the enactment of this 1869 statute could land in Mashpee legally be transferred to nonproprietors. It was this 1869 statute which effected an alienation of "tribal" land, if any such alienation occurred. The date 1869, rather than 1842, is the significant date.

meeting, the citizens of Mashpee voted to accept status as a town (Tr. T. 36-59-60). During the period following incorporation as a town, there was a manifest absence of evidence of Indian self-identification or of a coherent Indian community in Mashpee (Tr. T. 6-131-141; 36-56-59).

In present day Mashpee, the claimed members of the petitioner are politically, socially and culturally assimilated into the general populace (Tr. T. 31-116). They participate actively in town government (Tr. T. 31-148), in local social organizations (Tr. T. 24-173-181) and in the general market economy (Tr. T. 31-158). There is no separate and distinct Indian political leadership in Mashpee (Tr. T. 31-122 *et seq.*; 33-137, 168).[6] No Indian language has been spoken in Mashpee for years (Tr. T. 29-33; 31-169). There exists no distinctively Mashpee Indian culture (Tr. T. 29-33; 31-182, 185-187; 33-132). As stated in a thesis written in 1973 by one of the petitioner's own expert witnesses after extensive field research and before any claim of tribal existence was made by the petitioner:

> There is no longer any pretense that the community of Mashpee is in any sense separable from the socioeconomic and political context of American life.

(Tr. T. 18-206-207.)

[6]In its petition, the petitioner implies that the Mashpee Wampanoag Indian Tribal Council, Inc., was incorporated in response to loss of control of the government of the Town of Mashpee. Pet. 7. No evidence was adduced at trial which would support this implication.

Reasons for Denying the Writ.

I. The Factual Issues Presented by the Petition were Correctly Decided Below and are Too Narrow to Warrant Review.

The instant petition arises from a forty-day trial characterized by extensive and, at times, conflicting evidence. Pet. 47a. *See* Pet. 39a n.1. The jury heard testimony from forty-four witnesses (thirty called by the petitioner), including two historians, four anthropologists (three called by the petitioner), a genealogist, the Solicitor of the Department of the Interior and two officials of the Bureau of Indian Affairs. In addition, five witnesses testified by deposition; two hundred sixty-four exhibits were introduced; and the trial transcript totaled more than 7,250 pages. After a charge lasting more than two hours, the jury deliberated over a three-day period and determined that the petitioner had failed to prove its existence as an Indian tribe within the meaning of the Nonintercourse Act at all relevant times. The District Court, after an independent review of the evidence, Pet. 39a-47a, held that the jury's special verdicts required that the action be dismissed. Pet. 52a.

The issues now presented by the petitioner are predicated upon the peculiar and particular facts adduced during this protracted litigation. The petitioner's arguments represent no more than a litigant's dissatisfaction with jury verdicts which were correct when made and have now been affirmed by two courts. As will be demonstrated below, the petitioner's contentions raise no question of importance beyond the factual context of this case, but, rather, merely quarrel with the fact-finding function of the jury and the courts below.

(1) The petitioner asserts that the District Court failed to investigate adequately an anonymous phone call to a juror.

Pet. 11. Approximately three months after the return of the jury's special verdicts, the District Court received a communication from John Doe claiming he had discussed with one of the jurors an anonymous phone call received by that juror. The District Court immediately held a hearing during which Doe was examined.

Although the District Court expressly found Doe to be an unreliable witness, the District Court determined that further inquiry was necessary and, the next day, a hearing was held at which the juror was questioned. Pet. 31a, 34a. At that hearing, the juror testified that the call had taken place several weeks before jury deliberations began; that the call was ambiguous; that it gave him no clue as to which way he should vote; and that he did not attach any significance to it. The District Court found that the communication with the juror was "neutral" and "not prima facie prejudicial" and that "what happened . . . did not impeach the jury's verdict in any way at all." Pet. 32a.

In passing upon the propriety of the District Court's investigation of the alleged communication, the Court of Appeals examined all of the facts and circumstances before the District Court including, *inter alia*, "the remoteness in time, the isolated nature of the call, the ambivalence of the message conveyed, and the lack of identifiable source and threatened consequences . . .." Pet. 33a. The Court of Appeals concluded that, on this record, the District Court had "acted within the bounds of its discretion in conducting the investigation as it did and that its conclusion that the communication was not prejudicial is supported by a record which 'provides an adequate basis for review'."[7] Pet. 30a.

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[7] Although the Court of Appeals commented that the investigation conducted by the District Court was not "fully satisfactory," Pet. 30a, the petitioner misrepresents the Court of Appeals' holding by asserting that the

The Court of Appeals' affirmation of the investigation conducted by the District Court is consistent with both the standards enunciated in and the broad discretion afforded to a trial court by *United States* v. *Doe*, 513 F. 2d 709, 711-712 (1st Cir. 1975). *See also United States* v. *McKinney*, 429 F. 2d 1019, 1026 (5th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971). Significantly, the Court of Appeals' determination of the propriety of the District Court's investigation under *Doe* was dependent upon the particular facts and evidence involved; consequently, it is without any impact beyond this case. As this Court has often held, such limited factual issues do not merit review by certiorari:

> Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. [Citations omitted.] . . . [T]he decision . . . rests on concurrent findings. They are not to be disturbed unless plainly without support.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U.S. 175, 178 (1938).

(2) Similarly without merit is the petitioner's contention that the District Court's refusal to defer to the Department of the Interior warrants review by certiorari. The District Court predicated its denial of the petitioner's motion for a continuance, and the Court of Appeals its affirmation of the decision of the District Court, upon such particular circumstances as the "strong public interest in the prompt resolution" of this case, Pet. 7a, and the Department of the Interior's admitted

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Court of Appeals found the District Court's investigation "inadequate." Pet. 11. The holding of the Court of Appeals is precisely the contrary. Pet. 30a.

inability "to participate meaningfully in the trial of this case at this time." Pet. 4a. As the Court of Appeals stated:

> The Department has never formally passed on the tribal status of the Mashpees or, so far as the record shows, any other group whose status was disputed. Therefore, the Department does not yet have prescribed procedures and has not been called on to develop special expertise in distinguishing tribes from other groups of Indians. Moreover, the facts in this case, though developed and interpreted in part with the expert help of historians and anthropologists, are not so technical as to be beyond the understanding of judges or juries.

Pet. 7a.

On these facts, the lower courts correctly held that neither the purpose nor the rationale of the "deference doctrine," Pet. 5a, required a continuance of the trial.[8] Determinations of tribal status have been made judicially for more than 100 years. *United States* v. *Joseph*, 94 U.S. (4 Otto.) 614, 615, 617 (1877) (holding that the Pueblos were not an Indian tribe within the meaning of the Nonintercourse Act), *overruled as to result but not in logic*, *United States* v. *Sandoval*, 231 U.S. 28, 48 (1913). *Oneida Indian Nation of New York* v. *County of Oneida*, 434 F. Supp. 527, 538 (N.D. N.Y. 1977). This long-standing experience of the courts negated the claimed need to rely upon an agency whose own nascent procedures and standards admittedly precluded meaningful and prompt decision. Indeed, the need for timely adjudication of the issue of tribal

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[8]The petitioner was the plaintiff below and, by commencing this action, placed its own tribal status in issue. Having done so, the petitioner now claims error by the District Court in proceeding with an expeditious resolution of the very issues raised by its complaint.

status by the District Court is underscored by the failure of the Department of the Interior to complete its review of the petitioner's application to date.[9]

The correctness of the decisions of the two lower courts derives from the highly particularized facts of this case. The Court of Appeals acknowledged the limited import of its holding by stating that "in another case, once the Department has finally approved its regulations and developed special expertise through applying them, we might arrive at a different answer." Pet. 7a. Hence, this issue is "episodic" only, *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955), and fails to evidence the peculiar gravity and general importance required for review by certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

(3) The petitioner's challenge to selected and isolated portions of the trial court's instructions to the jury concerning the leadership element of tribal existence and voluntary abandonment of tribal status also fails to provide an issue of sufficient import to justify certiorari. In rejecting the petitioner's assignments of error concerning these instructions, the Court of Appeals stated:

> We conclude that though a few isolated sentences of the charge may have been unclear or overstated, the instructions taken as a whole were largely consistent with the position plaintiff argued before us. Therefore, we

[9]Significantly, any determination by the Department of the Interior would have been neither binding nor conclusive on the District Court. Moreover, any decision by the Department of the Interior would have related only to the present day status of the petitioner. It would not have determined tribal status on any of the several significant dates designated by the District Court. The District Court correctly declined to defer to such a problematical and legally inconclusive agency decision.

> will not reverse on the basis of the court's instructions. *This holding is a narrow one* . . . . [A]s to those portions we have considered, the issue we have decided, technically, is not whether those portions are correct as a matter of law, but whether they conform to the objecting party's view of the law. Finding they do, we see no remaining controversy. . . .
>
> The court did a good job with a very difficult task. Its explanation related the elements of the broad legal definition . . . to the *particular history of this group*.

Pet. 20a-21a (emphasis added).

As the Court of Appeals unequivocally indicates, resolution of the petitioner's assignments of error concerning these instructions did not in any sense broadly concern "the 'true' definition of 'tribe.'" *Id.* Rather, the Court of Appeals held only that, on the record before it, the District Court's instructions were a correct application of the petitioner's interpretation of the law to the facts of this case. Contrary to petitioner's contention, Pet. 7, the narrow issue decided here is not likely to recur and, therefore, review by certiorari is not warranted.

Failing to recognize the confines of the Court of Appeals' holding, the petitioner attacks the substantive validity of the District Court's instructions on tribal leadership and voluntary abandonment of tribal existence.[10] The petitioner's contentions are without merit. The requirement that a group claiming tribal status possess an independent "leadership or govern-

[10]The primary focus of the petitioner is a particular instruction, quoted at Pet. 13, which the petitioner asserts the Court of Appeals "[i]nexplicably . . . omitted . . . ." *Id.* This contention is a curious one, for most of the "omitted" instruction is quoted by the Court of Appeals in its opinion. Pet. 11a. *See* Pet. 10a, 13a.

ment" is well established. *United States* v. *Candelaria*, 271 U.S. 432, 442 (1926) (quoting *Montoya* v. *United States*, 180 U.S. 261, 266 (1901)). *See United States* v. *Mazurie*, 419 U.S. 544, 557 (1975) (distinguishing private voluntary associations). Equally settled is the proposition that an Indian tribe, even if federally recognized, can voluntarily abandon tribal existence. *United States* v. *Joseph*, *supra*. *See The Kansas Indians*, 72 U.S. (5 Wall.) 737, 759 (1867). The instructions of which the petitioner now complains[11] are entirely consistent with the principles of these cases.[12] The petitioner's rhetoric that the District Court's instructions were erroneously "particular, restrictive and ethnocentric," Pet. 14,[13] neither accurately

[11] The petitioner's selective quotation of isolated phrases from the charge belies the length and detail of the District Court's instructions on the issue of abandonment. Pet. 16a-18a.

[12] Indeed, in the words of the Court of Appeals, the District Court's instructions, at least on the issue of tribal leadership, were "more favorable to [petitioner] than the every day usage of the terms in the *Montoya* definition would be. . . ." Pet. 15a.

[13] The petitioner also claims that "few tribes" could meet the definition of the District Court. In support of this contention, the petitioner cites as examples the federally recognized tribes described in *State of Washington* v. *Fishing Vessel Association*, ___ U.S. ___, 47 U.S.L.W. 4978 (July 2, 1979). However, as Leslie Gay, Chief of the Branch of Tribal Relations of the Bureau of Indian Affairs, testified at trial, federal recognition of a group of persons is a political process not necessarily related to any definable legal standards (Tr. T. 19-122-123, 153). Such recognition may be dependent upon nothing more than an historical relationship between the United States and the tribe (Tr. T. 19-122-123). Mr. Gay further testified that an Indian tribe, once recognized by the federal government as such, remains a tribe without regard to the degree of acculturation, assimilation, political autonomy or social distinctiveness of the group (Tr. T. 19-153-154). The federally recognized Indian tribe is, in effect, "locked in" as a tribe. *Id.* These federally recognized Indian tribes consequently provide an inadequate source of comparison for a case, such as the instant case (Tr. T. 19-113), where no historical federal relationship is extant. Similarly, the definition of tribe enunciated in this case has no impact upon Indian tribes having such an historical federal relationship.

characterizes the charge to the jury nor describes any issues worthy of review by this Court.

(4) The petitioner also claims that the District Court's instructions allocating the burden of proof and the Court of Appeals' affirmation of those instructions provide an issue sufficient for certiorari. The narrow issue presented by the petitioner is whether, once a plaintiff has shown that it was an Indian tribe, the burden shifts to the defendants to prove that the plaintiff thereafter voluntarily abandoned its tribal status. Pet. 21a-22a. As set forth below in greater detail, the lower courts correctly held that it did not. *See infra* at 21-24.

The issue arises in this case only as a result of the peculiar evidence which permitted the jury to find tribal existence in 1834 and 1842 but not thereafter. Determination of this issue therefore does not have the broad application the petitioner claims. Indeed, resolution of this narrow question was of minimal importance:

> The importance of the burden of proof is minimized in this case because each party presented some evidence relevant to the voluntariness of the tribe's change in status. Therefore, it is unlikely that the issue was decided for lack of evidence. The jury's problem was not so much weighing conflicting evidence as choosing between plaintiff's and defendants' interpretations of the historical data.

Pet. 24a n.14. Accordingly, the issue lacks the general importance and broad impact necessary to justify review by certiorari.

(5) Finally, the petitioner claims that the jury's verdicts finding tribal existence in 1834 and 1842 but not thereafter

cannot be supported by the evidence and that the lower courts therefore erroneously determined the verdicts to be neither irreconcilably inconsistent nor fatally ambiguous. It was, however, the constitutional duty of the lower courts to attempt to harmonize the jury's special verdicts if at all possible. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963) (a court "must attempt to reconcile the jury's findings, by exegesis if necessary . . . before [it is] free to disregard the jury's special verdict"). In discharging this duty, the District Court and Court of Appeals extensively reviewed the evidence and correctly held that the facts fully supported the jury's findings. Pet. 25a-30a, 50a-51a. Both lower courts specifically relied upon the evidence of a brief flurry of intense "tribal" political activity during the period 1834-1842; the sharply contrasting post-1842 efforts of the people of Mashpee to attain assimilation into the general non-Indian community; the absence of evidence of post-1842 Indian self-identification; and the post-1869 evidence of Mashpee life indicating "that Mashpee was voluntarily trying to carve a destiny like many another rural and coastal town . . .." Pet. 28a.

The exclusively factual nature of this issue is manifest. The only questions concerning the clarity or consistency of the verdicts the petitioner raises turn on the particular facts of this case alone and are of interest only to the parties. In essence, the petitioner requests that this Court make yet a third review of the lengthy trial record to see whether it can find what two previous courts have been unable to find. This Court consistently has held that such fact canvassing is not a task to be served by a grant of certiorari. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts"). The issue of the consistency and clarity of the verdicts raised by the petitioner has

been resolved twice in favor of the respondents and, in view of the highly individualized facts of this case, is without any broader impact. The petitioner's selective interpretation of the evidence it contends contradicts the special verdicts not only misconceives the duty imposed upon the lower courts to reconcile the jury's verdicts but also fails to provide an issue of sufficient import to warrant review.[14]

II. The Decision of the Court of Appeals does Not Conflict with Any Decision of this Court.

Neither the jury's verdict nor the decisions below conflict with this Court's decision in *Wilson* v. *Omaha Indian Tribe*, S. Ct. Nos. 78-160, 78-161, 47 U.S.L.W. 4758 (June 20, 1979). In *Wilson*, this Court held that 25 U.S.C. § 194 (1963) is "triggered once the Tribe makes out a prima facie case of prior possession." Slip Op. 13, 47 U.S.L.W. at 4761. The lower courts which have enumerated the elements of a *prima facie* Nonintercourse Act case uniformly have held that a plaintiff must show, *inter alia*, that (1) it is an Indian tribe within the meaning of the Nonintercourse Act and (2) the tribal status and the concomitant trust relationship between the Indian tribe and the United States have not been abandoned. *Oneida Indian Nation of New York* v. *County of Oneida*, *supra*, 434 F. Supp. at 537-538. *Narragansett Tribe of Indians* v. *Southern R.I. Land Development Corp.*, 418 F. Supp. 798, 803 (D. R.I. 1976) (citing *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370 (1st Cir. 1975)).

[14] The fact that attainment of citizenship or allotment of common lands cannot, standing alone, support a finding of abandonment, Pet. 16, does not preclude consideration of those factors as parts of a larger record. In attempting to isolate these factors from all others, the petitioner fails to address the record in its entirety.

Pet. 56a. The respondents' burden of proof under section 194 was contingent upon the petitioner's first satisfying its burden on these issues. Because the initial trial was limited to the preliminary issues of petitioner's tribal status *vel non*, the allocation of the burden of proof to the petitioner fully accords with section 194 and the *Wilson* interpretation of that provision.[15]

This Court further noted in *Wilson* that "it is apparent that in adopting [§ 194] Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States." Slip Op. 12, 47 U.S.L.W. at 4761. Section 1 of the 1834 Indian Trade and Intercourse Act defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished . . .." *Id.* The present dispute clearly arose outside of "Indian country." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 580, 589 (1832) (McLean, J. concurring). Accordingly, neither section 194 nor the *Wilson* construction of section 194 has any application here.

This limitation on the application of section 194 is particularly apposite here. Section 29 of the 1834 Indian Trade and Intercourse Act repealed the 1802 Indian Trade and Intercourse Act except for Indian tribes residing east of the Mississippi River. Act of June 30, 1834, ch. 161, 4 Stat. 729, § 1. As to those eastern Indian tribes, the 1802 Indian Trade and Intercourse Act remained effective. It was this 1802 Act, if any, which would have applied to the post-1834 transactions of which the petitioner complains. The final proviso of § 1 of the

[15]In any event, *Wilson* precludes application of § 194 to the Commonwealth of Massachusetts or its officer, the respondent Matthew B. Connolly, Jr.

1802 Act demonstrates, however, that "all provisions contained in the [1802] Act" were limited in application to "Indian country" as defined therein. Act of March 30, 1802, ch. 13, 2 Stat. 139, § 1. *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 369 (1829). Mashpee, Massachusetts, was not and is not within "Indian country" as delineated by the 1802 Act and, therefore, section 194 has no application in this case.[16]

Moreover, the facts of this case do not resemble those involved in *Wilson* in any way. The Indian claimant in *Wilson* was the Omaha Indian Tribe, a federally recognized Indian tribe which, in 1854, had entered into a treaty with the United States. Slip Op. 2, 47 U.S.L.W. at 4759. Its tribal existence simply was not in issue. *Wilson* consequently did not involve adjudication of the preliminary question of tribal status involved in this case, and does not dictate a different allocation of the burden of proof than that made by the two courts below.[17] The petitioner cannot shift the burden of proof to the respondents by the mere assertion of tribal existence.

There is no direct or irreconcilable conflict between the decisions below and *Wilson* on any issue of law or fact. Despite the petitioner's efforts to create a conflict,[18] close scrutiny

[16]Indeed, as argued in the conditional cross-petition filed by the respondents (S. Ct. No. 79-61), the exception embodied in section 19 of the 1802 Trade and Intercourse Act, Act of March 30, 1802, ch. 13, 2 Stat. 139, § 19, would abrogate the statutory basis of the petitioner's entire claim even if the more general limitation to "Indian country" was not applied.

[17]Nor does the only other decision citing section 194 involve an issue of tribal status. *Felix* v. *Patrick*, 36 Fed. 457, 461 (C.C.D. Neb. 1888), *aff'd*, 145 U.S. 317 (1892) (suit to cancel land transfers).

[18]The petitioner acknowledges that the courts below held that section 194 had no application to the preliminary issue of tribal status. Pet. 9. The petitioner claims that "a similar holding" was rejected in *Wilson*. Even a cursory reading of *Wilson*, however, reveals the total dissimilarity between the holding of the *Wilson* lower court and those of the lower courts here. The

reveals *Wilson's* complete dissimilarity from, and inapplicability to, the present case. The petitioner's imaginary conflict does not warrant review of this case by certiorari.

Conclusion.

For the reasons set forth above, the petition for writ of certiorari should be denied.

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Wilson trial court held that section 194 was so "inextricably entwined with the merits" that it could have *no* application. Slip Op. 5, 47 U.S.L.W. at 4759. It was this complete rejection of section 194 which was held to be error by this Court. Slip. Op. 13, 47 U.S.L.W. at 4761. The lower courts here held only that section 194 applied to issues to be tried subsequently; they did not deny the applicability of section 194 after proof of a *prima facie* case.

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